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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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09/781,610

02/12/2001

Jonathan Stanley Harold Denyer

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11/15/2010

PHILIPS INTELLECTUAL PROPERTY & STANDARDS

P.O. BOX 3001

BRIARCLIFF MANOR, NY 10510

EXAMINER

MENDOZA, MICHAEL G

ART UNIT

PAPER NUMBER

3734

MAIL DATE

DELIVERY MODE

11/15/2010

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/781,610
Filing Date: February 12, 2001
Appellant(s): DENYER ET AL.

BENJAMIN L. KIERSZ
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 8/16/2010 appealing from the Office action mailed 4/10/2010.

(1) Real Party in Interest

The examiner has no comment on the statement, or lack of statement, identifying by name the real party in interest in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The following is a list of claims that are rejected and pending in the application:

Claims 1, 3, 7, 8, 12, 21, 39-41, 44, and 51-63 are pending.

Claims 1, 3, 7, 8, 12, 21, 39-41, 44, and 51-63 are rejected.

(4) Status of Amendments After Final

The examiner has no comment on the appellant's statement of the status of amendments after final rejection contained in the brief.

(5) Summary of Claimed Subject Matter

The examiner has no comment on the summary of claimed subject matter contained in the brief.

(6) Grounds of Rejection to be Reviewed on Appeal

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being maintained by the examiner except for the grounds of rejection (if any) listed under the

subheading "WITHDRAWN REJECTIONS." New grounds of rejection (if any) are provided under the subheading "NEW GROUNDS OF REJECTION."

(7) Claims Appendix

The examiner has no comment on the copy of the appealed claims contained in the Appendix to the appellant's brief.

(8) Evidence Relied Upon

4,617,557	GORDON	10-1986
5,237,987	ANDERSON et al.	8-1993
5,562,550	CHARTRAND	10-1996

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

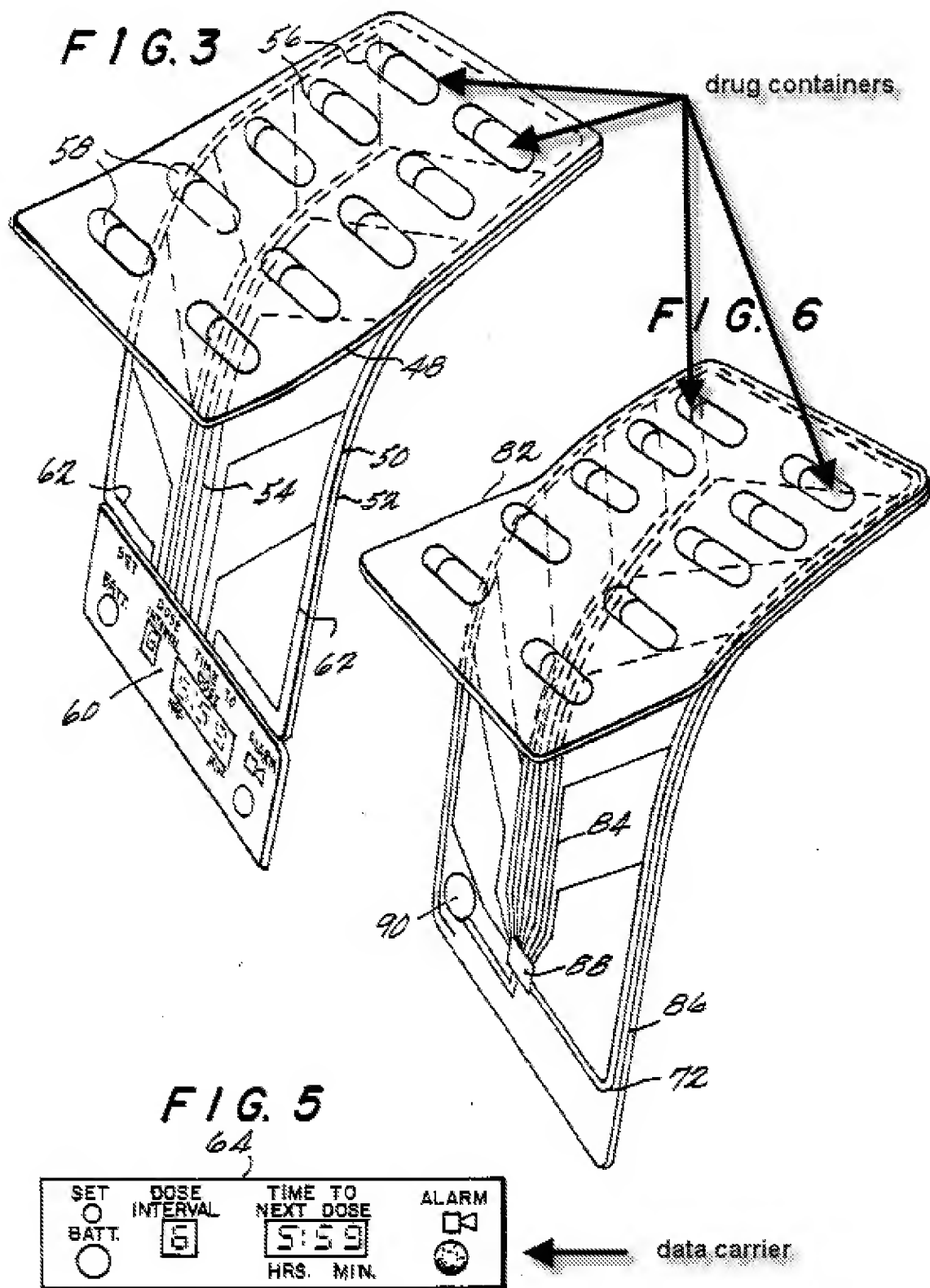
1. Claims 1, 3, 4, 7, 8, 12, 19-21, 54, 58-59, 60, 62, and 63 are rejected under 35 U.S.C. 102(b) as being anticipated by Gordon 4617557.
2. Gordon teaches a drug package comprising: a least one container containing a drug; an electronic data carrier including a memory, the electronic data carrier further includes a radio frequency device; wherein the electronic data carrier is arranged to supply the drug treatment information a number of times corresponding to the number of treatments available from the drug package, or the number of containers included in the drug package (col. 2, lines 22-30); wherein the at least one container is a plurality of containers and wherein the electronic data carrier is a single electronic data carrier; wherein the memory stores information; wherein the drug treatment information includes at least one of the following items: an identity of the drug which is to be delivered; a

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security code; a desired amount; a desired frequency of treatment; or an expiration date (col. 2, lines 22-30); a radio frequency transmitter (70) and a radio frequency receiver (74) .

3. As to claim 57, the at least one container can be read as the blister pack, the first container can be considered one capsule, and the blister pack can be considered a single compartment. All the capsules are contained within the single compartment of the blister pack.

4. As to claim 59, it has been held that to be entitled to weight in method claims, the recited structure limitations therein must affect the method in a manipulative sense, and not to amount to the mere claiming of a use of a particular structure. *Ex parte Pfeiffer*, 1962 C.D. 408 (1961).



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5. Claims 39-41, 44, 48, and 61 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gordon in view of Chartrand 5562550.

6. As to claim 39 and 40, Gordon teaches a plurality of drug containers, each container containing a drug; and an electronic data carrier separate from the drug containers, the carrier including drug treatment information. It should be noted that Gordon fails to teach wherein the data carrier is arranged to be powered inductively from a radio frequency signal. Gordon teaches that the data carrier is powered via a battery.

7. Chartrand teaches a device with a data carrier arranged to be powered inductively from a radio frequency signal as opposed to the battery powered data carrier taught by Gordon. Therefore, it would have been obvious to use a data carrier arranged to be powered inductively from a radio frequency signal an alternative to battery powered data carrier, because they are expedients of each other. Furthermore, inductively powered data carriers are well known in the art of electronics.

8. Gordon/Chartrand teaches wherein the drug treatment information includes at least one of the following items: an identity of the drug which is to be delivered; a security code; a desired dose amount; a desired frequency of treatments; or an expiration date of the drug (col. 2, lines 22-30).

9. Claims 1, 13, 19, and 53-56 are rejected under 35 U.S.C. 103(a) as being unpatentable over Anderson et al. 5237987 in view of Gordon.

10. As to claims 13 and 19, Anderson et al. teaches a drug delivery device; a delivery portion (52); an electronic input (228) arranged remotely from the delivery

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portion; and electronic data carrier removable from the drug delivery device (see claim 5); a delivery controller (28); a memory located within the electronic data carrier; and an output. It should be noted that Anderson et al. fails to teach transmitting treatment information via a radio frequency signal.

11. Gordon teaches a device with an output for transmitting treatment information via a radio frequency signal as opposed to the circuitry taught by Anderson et al. for transmitting information. Therefore, it would have been obvious to use a radio frequency signal as an alternative to circuitry for transmitting information because they are expedients of each other. Furthermore, wireless connectivity is well known in the art of electronics.

12. As to claims 16-18, 51, and 52, Anderson/Gordon teaches the device according to claim 13, wherein the drug delivery device includes an authorization portion (col. 12, lines 11-18); wherein the drug delivery device is selected from one of a pneumatic nebulizer, a piezo-electric nebulizer, or an ultrasonic nebulizer (Anderson is an air driven/pneumatic nebulizer).

(10) Response to Argument

13. The appellant argues that Gordon fails to teach a drug adapted for delivery in air inhaled by a patient to their lungs. The limitation is a functional limitation and is treated as such since the drug delivery device is not positively claimed. Furthermore, it is well known in the art that capsules can carry powders and that powders can be inhaled (evidenced by Anderson).

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14. As to claim 1, the appellant argues that Gordon does not teach a drug delivery device. The appellant has not positively claimed a drug delivery device in claim 1 or what the drug delivery device comprises. The focus of claim 1 as stated in the preamble is a "drug package". Gordon teaches a drug package.

15. As to claim 12, the appellant argues that Gordon is directed solely to manually swallowed tablet/capsules, rather than drugs delivered via a nebulizer. The appellant has not positively claimed a nebulizer. The drugs of Gordon only need to ability to be used with a nebulizer. The contents of the capsules are fully capable of being used with a nebulizer.

16. As to claim 19, the appellant argues that Gordon does not teach a drug delivery device. The appellant has not positively claimed a drug delivery device in claim 1 or what the drug delivery device comprises. The device of Gordon reads on the limitation of a drug delivery device because the capsules are delivered/removed from the device to be given to a user.

17. As to claim 57, the appellant argues that Gordon does not teach that all of the drug in the first container is commonly stored in a single compartment of the first container; and the drug treatment information comprises information indicating that some, but not all, of the drug in the first container should be delivered by the drug delivery device. The examiner disagrees. The pack 82 reads on a first container. The pack 82 can be considered as a whole as one compartment. The device of Gordon reads on the limitation of a drug delivery device because the capsules are delivered/removed from the device to be given to a user.

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18. As to claim 59, it has been held that to be entitled to weight in method claims, the recited structure limitations therein must affect the method in a manipulative sense, and not to amount to the mere claiming of a use of a particular structure. *Ex parte Pfeiffer*, 1962 C.D. 408 (1961). The claim only recites a structure and does not manipulate the structure in any sense.

19. As to claims 21, 54, 60, and 61, the appellant argues that Gordon teaches that the transmitter 70 is part of the delivery device and the receiver 74 is part of the data carrier. One of ordinary skill in the art would have found it obvious to reverse the receiver and transmitter, since it has been held that a mere reversal of the essential working parts of a device involves only routine skill in the art. The function of monitoring the use of the device will not change.

20. As to claim 20, the appellant argues that Gordon does not teach a drug delivery device. The examiner disagrees. The appellant has not given any structural limitations in the claims as to what the drug delivery device comprises besides a chamber for receiving a drug. The device of Gordon teaches chambers into which capsules with drugs are placed. Gordon also teaches an electronic data carrier; and a radio frequency input (74). The device of Gordon reads on the limitation of a drug delivery device because the capsules are delivered/removed from the device to be given to a user.

21. As to claims 39 and 40, the containers of Gordon are capsules, capsules can contain powders or liquids, powders and liquids are known to be inhaled as evidenced by Anderson. The appellant has not specified what the drug comprises. Furthermore,

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the applicant has not positively claimed a drug delivery device. The appellant has only claimed that the drugs are for a drug delivery device. The appellant also argues that there is no obvious reason for powering the device inductively from radio signal. A data carrier arranged to be powered inductively from a radio frequency signal is an alternative to battery powered data carrier, because they are expedients of each other are powering on a device. Furthermore, inductively powered data carriers are well known in the art of electronics.

22. As to claims 13 and 19, the appellant argues that Anderson et al. a delivery controller for controlling the amount of the drug delivered to the patient based on receive treatment information. The examiner disagrees. The controller of Anderson uses instructions stored on removable memory (see claim 5). The instructions include treatment information on how to treat the user and includes information for use of a nebulizer.

23. As to claims 16-18, 56, Anderson teaches an authorization portion (alarms), and wherein the drug delivery device is selected from one of a pneumatic nebulizer, a piezo-electric nebulizer, or an ultrasonic nebulizer (Anderson is an air driven/pneumatic nebulizer). The examiner is not relying on Gordon for the teaching of drug capsules/tablets or for a blister package. The Gordon reference is used as a teaching reference for only radio transmission of information. A radio frequency signal as an alternative to circuitry for transmitting information because they are expedients of each other. Furthermore, wireless connectively is well known in the art of electronics.

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24. As to claim 17, the appellant argues that Anderson/Gordon fails to teach the drug delivery device includes an authorization portion which prevents delivery. The examiner disagrees. Anderson teaches alarms to warn of improper use (col. 13, lines 13-18). Gordon also teaches alarms to warn of improper use (col. 2, lines 11-18).

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Michael G. Mendoza

/Michael G. Mendoza/

Examiner, Art Unit 3734

Conferees:

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